

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 7th day of July, two thousand and eight.

PRESENT:

HON. CHESTER J. STRAUB,
HON. REENA RAGGI,
Circuit Judges,
HON. WILLIAM K. SESSIONS III,*
District Judge.

Karen Worytko,

Plaintiff-Appellant,

v.

No. 06-0371-cv

County of Suffolk, Michael Reppenger, Shield #4914,
individually and as police officer of the County of Suffolk,
Ferdinando Crasa, Shield # 5022, individually and as police

* The Honorable William K. Sessions III, Chief Judge, United States District Court for the District of Vermont, sitting by designation.

officer of the County of Suffolk, Kerry A. McGrath, individually and as police officer of the County of Suffolk, Suffolk County Police Department, Anthony Passarella, individually and as police officer of the County of Suffolk,

Defendants-Cross-Defendants-Appellees,

Donna M. Aiello, Timothy J. Aiello,

Defendants-Cross-Claimants-Appellees.

MICHAEL A. CIAFFA, (Mary Ellen O'Brien, *of counsel, on the brief*), Meyer, Suozzi, English & Klein, P.C., Garden City, NY, *for Plaintiff-Appellant.*

ARLENE S. ZWILLING, Assistant County Attorney (Christine Malafi, Suffolk County Attorney, *on the brief*), Hauppauge, NY, *for Defendants-Cross-Defendants-Appellees.*

ARTHUR J. SMITH, Baxter, Smith, Tassan & Shapiro, P.C., Hicksville, NY, *for Defendants-Cross-Claimants-Appellees.*

AFTER ARGUMENT AND UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment and order of the District Court are AFFIRMED.

Plaintiff-Appellant Karen Worytko appeals from a judgment of the United States District Court for the Eastern District of New York (Dennis R. Hurley, *Judge*) entered on December 23, 2005, dismissing her claims under 42 U.S.C. § 1983 and New York law following a jury trial and from an order denying her motion for a new trial pursuant to Fed. R. Civ. P. 59.

On appeal, Worytko principally challenges the District Court's jury instructions with respect to the entry into her home by several of the Suffolk County police officer defendants. Worytko argues (1) that this issue should not have even been submitted to the jury because the

evidence was insufficient to support a finding of exigent circumstances; and (2) that the District Court's instructions erroneously charged that "hot pursuit" alone could justify an entry without explaining the multi-factor test set forth in *United States v. MacDonald*, 916 F.2d 766, 769-70 (2d Cir. 1990) (en banc). Worytko further argues that the District Court abused its discretion in denying her Rule 59 motion on this basis and erred in concluding that the defendant officers would, in any event, be entitled to qualified immunity. We assume the parties' familiarity with the facts, the record of prior proceedings, and the issues on appeal. For the reasons that follow, we affirm the judgment of the District Court and the denial of Worytko's Rule 59 motion.

"We review a claim of error in a jury instruction *de novo* and will reverse only if the error was prejudicial in light of the charge as a whole. A jury instruction is proper so long as the charge correctly and sufficiently covers the case to allow the jury intelligently to decide the questions presented to it." *Bruneau ex rel. Schofield v. S. Kortright Cent. Sch. Dist.*, 163 F.3d 749, 761 (2d Cir. 1998) (citation omitted), *cert. denied*, 526 U.S. 1145 (1999). "Where the court's instruction misleads the jury as to the correct legal standard or where it fails to adequately inform the jury on the law, it will be deemed erroneous. An erroneous jury instruction mandates a new trial unless the error is harmless." *Cobb v. Pozzi*, 363 F.3d 89, 112 (2d Cir. 2004) (citation omitted).

"A district court's decision to grant or deny a motion for a new trial will be reversed only if the trial court's decision was an abuse of discretion. A motion for a new trial ordinarily should not be granted unless the trial court is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice." *DeFalco v. Bernas*, 244 F.3d 286, 305 (2d

Cir.) (citations and internal quotation marks omitted), *cert. denied*, 534 U.S. 891 (2001); *see also Nimely v. City of New York*, 414 F.3d 381, 392 (2d Cir. 2005).

Worytko's arguments fail because we find that she abandoned any claim of unlawful entry. In her Second Amended Complaint, Worytko alleged that the defendant officers "unlawfully entered [her] home without any permission, warrant or probable cause" and "illegally handcuffed" her. Although in setting forth her several causes of action she labeled this a "false arrest" claim, such a pleading states a claim for an unconstitutional search and seizure based on an unjustified entry into the home as well as a claim for an unconstitutional arrest based on a lack of probable cause. *See Loria v. Gorman*, 306 F.3d 1271, 1279, 1282 (2d Cir. 2002) (construing allegations of an arrest in plaintiff's home "without probable cause, justification and/or a warrant" in violation of the Fourth Amendment as claims "for common-law false arrest and for an unconstitutional search and seizure"). In addition, at trial, Worytko submitted a brief regarding the legality of the officers' entry, arguing both that the officers lacked probable cause to arrest her "either inside or outside her residence" and that there were no exigent circumstances justifying the entry. Worytko also specifically asked the District Court to instruct the jury on the factors relating to exigent circumstances set forth in *MacDonald*, 916 F.2d at 769-70. The District Court rejected Worytko's request and instructed the jury on entry into the home in the course of charging the elements of Worytko's claims for false arrest and false imprisonment.

Worytko continues to argue on appeal that her claim for unlawful entry was part of her claim of "false arrest." Indeed, as the defendants point out, no separate claim for unlawful entry as distinct from false arrest was submitted to the jury in the verdict sheet. And, as noted, the jury

instructions with respect to the entry fell within the charge on Worytko's false arrest and false imprisonment claims.

Worytko accurately maintains that probable cause alone does not justify a warrantless entry into a home. *See Kirk v. Louisiana*, 536 U.S. 635, 638 (2002) (per curiam) (“[P]olice officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home.”); *Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984); *Loria*, 306 F.3d at 1283-84.

The District Court, however, instructed the jury that “[p]robable cause, if present, is an absolute defense to the false arrest and false imprisonment counts. If probable cause was present for any of the charges leveled against plaintiff, . . . you must find for each of the . . . defendant police officers involved on plaintiff's false arrest and false imprisonment claims.” In response to this charge, Worytko neither invoked the rule that probable cause alone does not justify a warrantless entry into a home nor asserted a separate claim for unlawful entry. Rather, Worytko objected to this charge only on the grounds that it did not apply to arrests for non-felonies, not on the ground that it was inapplicable to any asserted claim for unlawful entry. Nor did Worytko dispute the dispositive nature of a finding of probable cause when the County Defendants requested a special interrogatory on the issue. Rather, Worytko merely argued that a separate interrogatory was “confusing or cumulative.” Finally, Worytko neither challenged this instruction in her Rule 59 motion nor in the instant appeal.

By conceding that the existence of probable cause was dispositive of her claim for false arrest, Worytko has abandoned any distinct claim for unlawful entry that might otherwise have

been subsumed therein. As the District Court noted in denying the Rule 59 motion, Worytko “does not explain which, if any, of her claims would require retrial should the Court accept her position.” Accordingly, we find any alleged error in the District Court’s jury instruction to be harmless, and we further find that the District Court did not exceed its allowable discretion in denying Worytko’s Rule 59 motion.

We have considered all of Worytko’s arguments and find them to be without merit. Accordingly, the judgment and order of the District Court are AFFIRMED.

FOR THE COURT:
Catherine O’Hagan Wolfe, Clerk

By: _____